United Nations A/CN.4/606/Add.1

General Assembly

Distr.: General
21 January 2009

Original: English

**International Law Commission**
**Sixtieth session**
Geneva, 4 May-5 June and 6 July-7 August 2009

# Report of the International Law Commission on the work of its sixtieth session (2008)

## Topical summary of the discussion held in the Sixth Committee of the General Assembly during its sixty-third session, prepared by the Secretariat

**Addendum**

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09-21635 (E) 110209

## B. Effects of armed conflicts on treaties

### 1. General comments

1. Delegations welcomed the Commission's completion, on first reading, of the draft articles on the effects of armed conflicts on treaties. Delegations expressed general support for the position that armed conflict did not automatically suspend or terminate the operation of treaties.

2. Nonetheless, the view was expressed that the draft articles did not sufficiently take into account the distinction between treaties establishing boundaries and other treaties, which had been done in the 1969 Vienna Convention on the Law of Treaties ("Vienna Convention of 1969") and the 1978 Vienna Convention on Succession of States in Respect of Treaties. It was also pointed out that greater clarity was needed as regards: the effects of armed conflict on treaty relations among belligerent States as differentiated from treaty relations between belligerent and non-belligerent States (draft article 1); as well as the mechanism for the resumption of operation of suspended treaties (draft article 12). Other suggestions included: considering the interruption of treaty relations with third States, as well as linking the draft articles more clearly to articles 70 and 72 of the Vienna Convention of 1969.

3. It was suggested also that in order to complete its work on the effects of armed conflicts on treaties, the Commission should undertake a more thorough examination of relevant State practice, in particular national judicial decisions, especially the relevant practice and doctrine of civil law countries. It was proposed that the Commission establish a questionnaire seeking information on past and current State practice.

4. The point was also made expressing doubts as to the need to address the topic, as recent armed conflicts had apparently not led to problems in respect of the law of treaties.

### 2. Comments on specific draft articles

#### Draft article 1 — Scope

5. While support was expressed for the approach taken in draft article 1, several delegations called on the Commission to consider the question of the effects of armed conflicts on treaties involving international organizations. Some other delegations supported the exclusion of international organizations from the scope of the draft articles as they did not generally participate in armed conflicts.

6. It was also suggested that the draft articles could more usefully draw the distinction between relations among belligerent States and those between a belligerent and a third State, since the solutions would not necessarily be the same. It was proposed that to safeguard the legitimate interests of third parties in the event of an armed conflict, the solution in article 60 of the Vienna Convention of 1969 could be applied. It was also suggested that the case in which two States might be on the same side in an armed conflict should also be considered. According to another view, the scope of the topic should not cover situations in which only one party to the treaty was a party to an armed conflict.

7. According to other suggestions, it was proposed that the reference to the draft articles "applying to" the effects of an armed conflict in respect of treaties, be

replaced by "dealing with"; that it be clarified that the draft articles are without prejudice to the role of international humanitarian law as the "*lex specialis*" applying to armed conflict; and that the effects of armed conflict on provisionally applied treaties should be included within the scope of the draft articles.

**Draft article 2 — Use of terms**

8. Regarding the term "armed conflict", defined in subparagraph (b), it was noted it was defined for the purposes of the draft articles only. The view was also expressed that it was not necessary to include a definition of "armed conflict" in the draft articles, since the term belonged to the sphere of international humanitarian law and because the inclusion of a separate definition in treaty law might contribute to fragmentation of international law. Several delegations supported a clear indication in the draft articles that international humanitarian law was the *lex specialis* governing armed conflict.

9. Several delegations were of the view that the draft articles should deal only with international armed conflicts. It was maintained that the codification could become unmanageable if the definition of armed conflict was extended to cover all possible conflicts, including non-international and asymmetrical ones. It was recalled that the 2001 articles on responsibility of States for internationally wrongful acts, particularly the provisions on the circumstances precluding wrongfulness, might cover situations resulting from the non-application of treaties in a non-international armed conflict.

10. Some other delegations expressed support for the inclusion of internal conflicts within the scope of the draft articles, even if the effects of an internal conflict on treaty relations would not necessarily be the same as those of an international conflict. It was maintained that leaving internal armed conflict out of the draft articles would greatly limit their applicability, as most present-day armed conflicts were internal.

11. Concern was also expressed with regard to the use of the terms "occupation" and "armed conflict" — two separate concepts in the law of armed conflict — in the same provision.

12. It was noted that the term "state of war" could be replaced with "state of belligerency" or "the outbreak of hostilities between States".

**Draft article 3 — Non-automatic termination or suspension**

13. Delegations expressed general support for draft article 3, which was said to constitute the core of the draft articles and to be supported by customary international law as being essential in safeguarding the stability and certainty of treaty relations.

14. A preference was nevertheless expressed for reverting to the term "ipso facto", instead of "necessarily". It was also pointed out that neither "necessarily" nor "automatically" were synonyms for "ipso facto".

15. The view was also expressed that the omission of specific treatment of boundary treaties in draft article 3 risked sending the wrong message to States which harboured an intention to alter the demarcation of their borders.

**Draft article 4 — Indicia of susceptibility to termination, withdrawal or suspension of treaties**

16. A concern was expressed regarding the inclusion of the possibility of withdrawal as an option in draft article 4 as it seemed to contradict the content of draft article 3.

17. On subparagraph (a), reference was made to the fact that the grounds for termination and suspension provided in the Vienna Convention of 1969 should be regarded as fundamental and not merely supplementary. At the same time, it was noted that the reference to articles 31 and 32 of the Vienna Convention of 1969 was of little practical use because States did not necessarily have in mind the future possibility of armed conflict when concluding treaties.

18. As regards subparagraph (b), concern was expressed that the criteria set out therein appeared circular, as well as unconnected with the traditional grounds for terminating and suspending treaties (and if used arbitrarily could threaten the stability of treaty relations). It was suggested that the indicia be further considered, including: by adding criteria referring to the intensity and duration of the conflict; by referring not only to the subject matter of the treaty but also to its provisions; and by including a reference to the intention of the parties. Some other delegations expressed support for the Commission's decision to abandon the criterion of the intention of the parties. It was further noted that the internal or international nature of an armed conflict was one of the elements to be considered under subparagraph (b). It was also suggested that the text should more clearly specify that the criteria are indicative and not exhaustive.

**Draft article 5 — The operation of treaties on the basis of implication from their subject matter, and annex thereto**

19. While support was expressed for the general thrust of draft article 5, it was proposed that it expressly specify the general criteria which would lead to the implication that specific treaties would continue in operation during armed conflict. In was maintained that the list of categories of treaties in the annex was insufficient for that purpose. It was also proposed that the operation of specific treaties or parts thereof during an armed conflict should be considered on a case-by-case basis, and that the reference to specific treaty categories be made in the commentary. Some other delegations were of the view that the indicative list was useful, but called for further study, including with regard to the inclusion of multilateral law-making treaties, as well as for an express reference to the list in draft article 5.

20. As regards the content of the indicative list of categories, the view was expressed that its arrangement seemed illogical and needed to be modified. It was also suggested that treaties relating to international criminal law, establishing or modifying river boundaries, dealing with international transport, as well as embodying *jus cogens* norms be included.

**Draft article 6 — Conclusion of treaties during armed conflict**

21. As regards paragraph 2, the inclusion of the word "lawful" was queried and its deletion was suggested. It was also suggested that the commentary could indicate that the provision was without prejudice to draft article 9, Obligations imposed by international law independently of a treaty.

**Draft article 7 — Express provisions on the operation of treaties**

22. A proposal was made that draft article 7 also provide that any treaty provisions must be regarded as decisive, whether they envisaged the treaty continuing in operation or expressly provided for the contrary. It was also suggested that the provision be located after draft article 4, as an example of subparagraph (a) of that provision, as well as being closer to draft article 5, which dealt with the opposite situation. According to another view, the provision could be deleted as being superfluous.

**Draft article 8 — Notification of termination, withdrawal or suspension**

23. While some delegations expressed support for draft article 8, some other delegations raised doubts. For example, the concern was expressed that, since no specific exception for boundary treaties had been included in the draft articles as a whole, armed conflict could provide the pretext for States wishing to terminate, withdraw from or suspend such treaties. It was further proposed that, since the draft articles covered the position of third States, provision ought also to be made for the obligation to notify such third States of an intention to terminate or withdraw from a treaty as a result of armed conflict. In addition, the Commission was called upon to reconsider its preference for not including a reference to the peaceful settlement of disputes in the provision.

24. On paragraph 1, it was queried whether it would always be practical for a State party that intended to withdraw from or terminate a treaty to carry out its obligation to notify other States parties of its intention, particularly if the other State party or other States parties or the depositary were belligerents. In addition, it was proposed that the initial right of a party to an armed conflict to give such notification be limited to treaties not covered by draft article 5.

25. It was proposed that paragraph 2 be made subject to the proviso "unless the notice states otherwise".

26. The view was expressed that paragraph 3 was insufficiently clear on the effects of an objection by a State to the termination or suspension of a treaty and could create ambiguity as to the fate of the treaty.

**Draft articles 9 to 18 — Remaining draft articles**

27. While support was expressed for draft articles 9, Obligations imposed by international law independently of a treaty, and 10, Separability of treaty provisions, it was suggested that the structure of draft article 10, and its relationship with draft article 5, required further study.

28. On draft article 11, Loss of the right to terminate, withdraw from or suspend the operation of a treaty, it was queried whether subparagraph (a) was too rigid, and it was proposed that the relationship between draft articles 11 and 17, Other cases of termination, withdrawal or suspension, be clarified.

29. As regards draft article 12, Resumption of suspended treaties, it was pointed out that it was unclear whether the decision to resume the operation of the treaty was the unilateral decision of the party which suspended its operation or whether the other parties to the treaty would also be involved. It was also suggested that draft

articles 12 and 18, Revival of treaty relations subsequent to an armed conflict, be located next to each other.

30. Support was expressed by some delegations for draft article 13, Effect of the exercise of the right to individual or collective self-defence on a treaty. Nonetheless, it was noted that the discretion to suspend treaty relationships, in the context of the use of force in the exercise of the right to self-defence, should be strictly limited so as to support the stability of treaty relations. It was also wondered why a State exercising its right of individual or collective self-defence could only suspend the operation of a treaty, but not withdraw from or terminate it. A preference was expressed for the version adopted by the Institute of International Law in 1985, which had included a reference to a later determination by the Security Council of the existence of an act of aggression.

31. While support for draft article 14, Decisions of the Security Council, was expressed by some delegations, it was also proposed that the provision could be deleted as being superfluous, or because it dealt with matters outside the mandate of the Commission.

32. Support was expressed by some delegations for draft article 15, Prohibition of benefit to an aggressor State. It was suggested that the Commission ought to keep in mind that other definitions of the term "aggression" were being developed, including in the context of an impending review of the Rome Statute of the International Criminal Court. It was also pointed out that it was necessary to clarify the situation where an aggressor State purported to withdraw from a treaty or suspend its application in accordance with that treaty, thus establishing a conflict between draft article 15 and the relevant provisions of the treaty. According to another view, the question of possible benefit to an aggressor State should be regarded as a relevant consideration but not necessarily a decisive one.

33. As regards draft article 16, Rights and duties arising from the laws of neutrality, the point was made that it was not clear why the laws of neutrality should be treated in a separate article rather than being included in the indicative list of categories of treaties referred to in draft article 5.

34. It was proposed that to the grounds listed in draft article 17, Other cases of termination, withdrawal or suspension, one could add the provisions of the treaty itself.

35. As regards draft article 18, Revival of treaty relations subsequent to an armed conflict, it was noted that it was unclear why withdrawal was omitted from the provision. It was also suggested that the relationship with draft article 12 needed to be clarified.